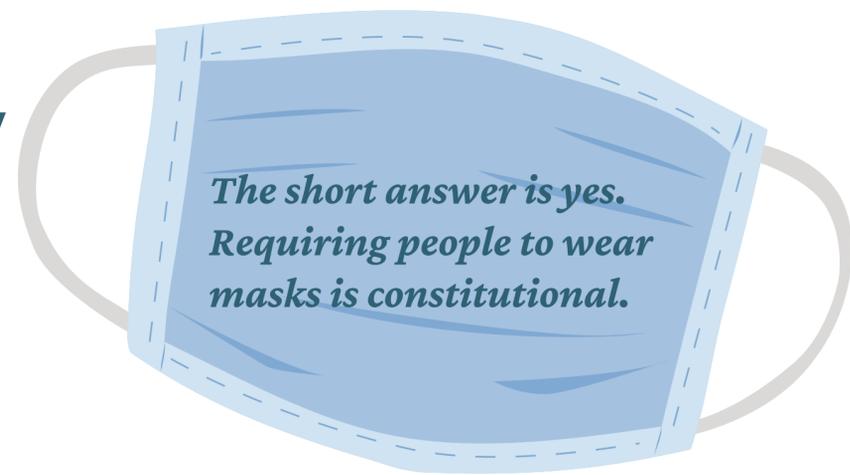


Does a business, your employer, or the government have the right to require people to wear masks during a pandemic?*



Households

There are no recommendations or requirements that individuals wear masks within their homes. However, the Supreme Court of the United States has recognized that a State "may adopt reasonable restrictions on private property" when necessary. Currently private property restrictions are limited to commercial spaces and large gatherings.

Employers

Most employers are governed by the Occupational Health and Safety Administration ("OSHA") or a state equivalent. OSHA recommends that all employers encourage employees to follow CDC recommendations. Thus, your employer can justifiably rely on CDC guidance and require face coverings. Exceptions exist for work conditions in which Personal Protective Equipment ("PPE") is required and incompatible with face coverings.

State Governments

For nearly 200 years, the Supreme Court decision in *Gibbons v. Ogden* has controlled; it held that state governments have broad police powers under the 10th Amendment of the Constitution. Thus, because this power is so broad, state governments have a constitutional right to implement face mask requirements during COVID-19. Challenges that face mask requirements violate citizen constitutional rights would likely fail. In 1902, during the smallpox outbreak, *Jacobson v. Massachusetts* challenged a state vaccine requirement for violating constitutional rights and abuse of state police powers. However, the Supreme Court upheld the vaccination requirement and set precedent for the reasonable restriction of constitutional rights for the benefit of public health through police powers. Moreover, the Supreme Court just affirmed *Jacobson* in *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor Of California, et al* in regard to restrictions on public gatherings. Thus, even if a right to be free of face masks was found, mask requirements would likely be upheld as a reasonable restriction during COVID-19

Stores

No Shoes, No Shirt, No mask, No service. Businesses can refuse service to anyone, for any reason, other than for being a member of a protected class. Businesses can justifiably rely on CDC guidance and require face coverings. While generally the Americans with Disabilities Act ("ADA") prohibits screening individuals with disabilities, businesses can refuse service if necessary to safely operate a business. Only if an individual claiming a disability and refusing to wear a mask is a "direct threat" may a retailer refuse service. Note that special provisions may apply to businesses providing medicine.

Schools

While the U. S. Department of Education and the CDC have provided some guidance for schools planning to reopen, school administrators have authority to tailor school masks requirements to the health conditions of their district. Subject to state and local laws by which they are bound. Guidance for educators will come from state governors and state health departments, however schools may have additional requirements, as administrators see fit.

Federal Government

Federal authority to mandate face coverings is unprecedented. Other than at U. S. Borders, the federal government has significantly less control than state governments during a public health crisis. This is because the United States has a decentralized public health system. *Whether federal authority could exist*, likely depends on a Supreme Court interpretation of the Commerce Clause. However, this potential authority was not used during to Spanish Influenza nor the more recent Ebola threat. During the Spanish Influenza, it was the city and county officials who made public health decisions, including face mask requirements and closures.

***Liability laws vary from state to state so consult local counsel. This flyer does not address the liability of people who do not wear masks or businesses permitting customers on their premises without a mask because state laws will vary on that issue as well. Created by Louise Taylor, Law Clerk at Foley & Mansfield, PLLP, on July 16, 2020 under the supervision of attorney Ashleigh Johnson. Citations omitted. For the latest updates, visit your state and local health department websites.**